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No. .....

In The

Supreme Court of the United States

October Term, 1984

SECURITY BANK & TRUST COMPANY
OF LAWTON, OKLAHOMA,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether a Governmental agency can disregard its published regulations as well as ignore its written promises when dealing with the public in the private financing of government contracts.

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SECURITY BANK & TRUST COMPANY
OF LAWTON, OKLAHOMA,

Petitioner,

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THE UNITED STATES,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

—o—

The Security Bank & Trust Company petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

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OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, infra, 1A-21A) is not reported. The opinion of the Claims Court (Appendix C, infra, 23A-48A) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 5, 1984. A timely Petition for Rehearing was denied on May 30, 1984 (Appendix B, infra, 22A). On August 27, 1984, Chief Justice Burger extended the time for filing a Petition for a Writ of Certiorari to and including September 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REGULATION INVOLVED

Armed Services Procurement Regulation, 32 C.F.R. 8-203 (Appendix E, infra, 51A-55A).

STATUTES INVOLVED

Assignment of Claims Act, 31 U.S.C. § 3727 and 41 U.S.C. § 15.

STATEMENT OF THE CASE

A. Facts Material To Consideration of the Question Presented

The Security Bank & Trust Co., was the assignee of the contract proceeds from a contract entered into between the Department of the Army at Fort Sill, Oklahoma, and the Small Business Administration, Contract #DABT 39-76-C-3164, dated September 20, 1976. Because the contract was entered into as part of SBA's Section-8(a) program, the contract was subcontracted to Foxie Bluford, dba Bluford Service Company under subcontract #SB 6328 (a) 77-C-700. Although these contracts were originally made for a period of one (1) year, from October 1, 1976, through September 30, 1977, they were thereafter extended on three (3) occasions, the last extension to run from February 28, 1978, until September 28, 1978.

In keeping with the general philosophy of the SBA-8(a) program, to make socially or economically disadvantaged contractors economically viable and able to compete as private enterprise, the SBA and Bluford approached the Security Bank & Trust Co., in March 1977, to obtain a line of credit for Bluford to assist in his performance of the contract at Fort Sill, Oklahoma. To secure an $80,000.00 line of credit, Bluford assigned the contract proceeds under his own subcontract for the SBA to Security Bank & Trust Co. The notice of assignment was properly given and acknowledged by the contracting officer and the finance and accounting officer at Fort Sill, Oklahoma, after which Plaintiff advanced Bluford $80,000.00, twice monthly, to be repaid twice monthly from the proceeds of his contract.

The Security Bank & Trust Co., line of credit to Bluford was scheduled to expire with the second extension of the contract from November 30, 1977, until February

28, 1978. At that time, the Bank became unsure of its status as assignee under the contract, and indicated that it did not desire to continue Bluford's line of credit secured by the assignment of the contract.

Upon learning this, Mr. Jack Rylant, Section-8(a) Program Officer from the SBA office in Oklahoma City, Oklahoma, discussed this matter with Mr. Perman Henderson, the Bank's Vice President, and attempted to persuade Mr. Henderson to continue with the line of credit, assuring him that because of the assignment of contract proceeds, the Bank was well secured. Henderson advised Rylant that the Bank would not extend further credit without assurance in writing from SBA that the Bank was totally secured by the assignment of contract proceeds.

Mr. Rylant prepared a letter to be sent to the Bank concerning the Security Bank & Trust Co.'s reservations about continuing the Bluford line of credit. (App. D, infra, 49A-50A). This letter advised that the contract had been extended through September 30, 1978, because Fort Sill had not been able to award a contract to a responsible bidder on an invitation for bid which had been issued in July 1977, and advised that in SBA's opinion an award under the invitation for bid would not be made within the remaining period. SBA advised the Bank that if an award was made, that the Small Business Administration would have at least thirty (30) days' notice of such award, and would immediately notify the Bank of the termination date of Bluford's contract.

This letter was forwarded to the Bank over the signature of Robert K. Ball, acting District Director, on March 10, 1978.

On August 24, 1978, the contract was terminated for convenience of the government, such termination to be effective August 31, 1978. Neither the United States Army nor the Small Business Administration gave Plaintiff any notice, either verbal or written at any time prior to September 22, 1978, that Bluford's contract had been terminated. The Department of the Army then awarded a direct contract to Foxie W. Bluford, dba Bluford Service Company for a period of one (1) month to run from September 1, 1978, through September 30, 1978. This contract was not assigned to the Bank and, in fact, Security Bank & Trust Co., never knew of its existence.

The Bank, as it had regularly done since May of 1977, advanced Bluford $80,000.00 to pay his payroll at Fort Sill on September 8, 1978. On September 11, 1978, the Bank routinely received a check from Fort Sill for services rendered by Bluford under the assigned contract for the last half of August, 1978. Although unknown to the Bank, this check was the last payment to Bluford under the contract which had been assigned to the Bank as collateral for the $80,000.00 line of credit Security Bank had extended to Bluford.

Because of the delay in processing Bluford's checks by the Finance Office at Fort Sill, Oklahoma, it was not unusual for Plaintiff to have two (2) $80,000.00 notes from Bluford before it would receive the government check paying the first $80,000.00 note. In September 1978, when Bluford needed another advance of $80,000.00 to meet his payroll, the Bank made another note, dated September 22, 1978, even though it had not received the government check for the advance which had been made to Bluford

on September 8, 1978. On September 25, 1978, three (3) days after the Bank had made its second advance (September 22, 1978), the Bank had received a check from Fort Sill, Oklahoma, in payment for services rendered by Bluford under the direct (unassigned) contract, for the first half of September 1978.

B. Procedural Background

Security Bank & Trust Company brought this suit against the United States (Small Business Administration and Department of the Army) to recover its loss which directly resulted from the government's breach of an implied in fact contract, as well as failure to provide notice of contract termination as provided in its own regulations. The case was tried before the Honorable Masten G. White in the U.S. Courthouse, Oklahoma City, Oklahoma, on December 14, 15, 1982. Thereafter, the parties submitted proposed findings of fact and conclusions of law, as well as Briefs in support of their respective positions. On June 6, 1983, Judge White entered a memorandum of decision wherein the complaint of the Security Bank & Trust Company was dismissed (App. C, infra, 23A-48A). The Trial Court determined that the government was not legally obligated to reimburse the Bank on a breach of contract theory for any loss sustained in connection with the $80,000 loan to Mr. Bluford on September 22, 1978.

Judge White held that the letter of March 10, 1978, was obviously designed to induce the Bank to continue making loans to Mr. Bluford in connection with performance of the subcontract. (App. C, infra, 31A). Judge White further announced that the $80,000 loan which the

Bank made to Mr. Bluford on September 22, 1978, was outside the scope of the agreement between the SBA and Security Bank arising from the letter of March 10, 1978. (App. C, infra, 32A). The Trial Court concluded that the SBA, as a matter of common courtesy in a desire to retain the confidence of the public and the integrity of the agency, should have given the Bank timely notice regarding termination of the KP contract and subcontract. (App. C, infra, 32A-33A). The Trial Court specifically found that the Bank would not have made the $80,000 loan of September 22, 1978, had it known that the KP contract and subcontract had been terminated. The complaint of Security Bank & Trust Company was dismissed.

A divided panel of the Court of Appeals affirmed (App. A, infra, 1A-21A). The Court of Appeals recited that the Bank received all of the funds paid by the government to Mr. Bluford for work done under the subcontract and discharged the government from further liability under the assignment. (App. A, infra, 12A). Moreover, the Court of Appeals characterized the $80,000 loan of September 22, 1978, as outside the scope of the agreement between the SBA and the Bank arising from the letter of March 10, 1978. Notwithstanding the lack of notice of contract termination, the Court concluded that the ill-fated loan to Mr. Bluford was used by him in the performance of the one month contract in which the SBA was not even involved. (App. A, infra, 12A).

The Court of Appeals purported to analyze the Bank's conduct after the fact and concluded that the Bank's loss stemmed from its own mismanagement and negligence. (App. A, infra, 13A-15A).

Like the Trial Court, the Court of Appeals determined that as a matter of "common courtesy," the government should have given notice to the Bank. (App. A, infra, 18A).

Circuit Judge Bennett dissented (App. A, infra, 18A-21A). He concluded that: "this is a clear and classic case of a contract implied in fact that has been breached by the government." (Id. at 18A). Judge Bennett disputed the majority's claim that a breach of regulations does not give rise to a claim for money. In Judge Bennett's view, *United States v. Testan,* 424 U.S. 392 (1976) is not supportive of the majority's position. Judge Bennett found that *Testan* was a claim of improper classification by Civil Service employees and had nothing to do with contract law. (App. A, infra, 19A). Furthermore, Judge Bennett specifically rejected the majority's characterization that the loan of September 22, 1978, was outside the scope of the agreement between the SBA and the Bank arising from the letter of March 10, 1978. In this connection, Judge Bennett observed:

> "Is it not strange to assert, as does the majority opinion affirming the Claims Court, that the SBA had an obligation to inform the Bank of a termination within the period of the original contract, but that the secret (to the Bank) termination of the contract by the government discharged any possible liability for the abrogation of its duty to inform the Bank if the contract was terminated? In effect, both the Claims Court and this Court recognize an obligation on the part of the SBA that, in practice, is absolutely meaningless." (App. A, infra, 20A-21A).

The Court of Appeals denied the Bank's Petition for Rehearing and Suggestion for Rehearing In Banc, Circuit Judge Bennett dissenting. (App. B, infra, 22A).

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REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Federal Circuit has completely disregarded the long-standing principle that regulations validly prescribed by a government administrator are binding upon him as well as the citizen. The Court of Appeals has held that the government may breach its own Armed Services Procurement Regulation (A.S.P.R. 32 C.F.R. § 8-203, App. E, infra, 51A-55A). The Court of Appeals concluded that the Army and the SBA should have given notice of contract termination to the Bank out of "common courtesy" and the government's failure to adhere to its own regulations imposed no liability. (App. A, infra, 17A-18A).

The Court of Appeals' ruling cannot be reconciled in any principled way with the unbroken line of this Court's decisions firmly establishing that the government must conform to its regulations, particularly those designed to provide procedural safeguards for fundamental rights. See, e.g., *Service v. Dulles,* 354 U.S. 363, 1 L.Ed. 2d 1403, 77 S.Ct. 1152 (1957); *United States ex rel., Accardi v. Shaughnessy,* 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954). Moreover, the Court of Appeals has ignored this Court's clear directive that a Court has no authority to overlook valid regulations providing for the receipt of government benefits. See, e.g., *Schweiker v. Hansen,* 450 U.S. 785, 790 (1981).

The Court of Appeals decision totally frustrates and fails to carry out the purpose of the Assignment of Claims Act which is to encourage the private financing of government contracts. See e.g., *Central Bank v. United States,* 345 U.S. 639, 97 L.Ed. 1312, 73 S.Ct. 917. The Court of

Appeals' opinion also departs from a long line of Claims Court decisions interpreting the Assignment of Claims Act (31 U.S.C. § 3727) which have consistently held that the assignee of government contract rights is entitled to certain governmental protection of its interest. See, e.g., *Mercantile National Bank of Dallas v. United States,* 280 F.2d 832 (Ct.Cl. 1960); *Central National Bank of Richmond, Virginia v. United States,* 91 F.Supp. 738 (Ct.Cl. 1950).

If the decision stands, it will send the message to the public that you cannot trust the government. Furthermore, you must assume that the government will not keep its authorized, written promises and that it will ignore, with impunity, its published regulations. For these reasons, and because the decision of the Court of Appeals threatens the sound administration of the private financing of government contracts, review by this Court is warranted.

The Armed Services Procurement Regulation, 32 C. F.R. 8-203(b), provides that notice of termination of contracts which are terminated at the convenience of the government must be provided by the procuring department to each known assignee. (App. E, infra, 53A). A similar provision is published by the Department of the Army in D.A.R. 8-203(b).

The Court is reminded that the contract between the Department of the Army and SBA, as well as the coordinated contract between SBA and Bluford, was terminated at the convenience of the government as of August 31, 1978.

The Armed Services Procurement Regulations at 32 C.F.R. 1-100, et. seq., apply to all purchases and contracts made by the Department of the Army. At 32 C.F.R. 1-705.5(J), it is stated that the contract administration of SBA's Section 8(a) contracts is handled by the Department of Defense Procurement Officer, and that the Armed Services Procurement Regulations will guide the contract administration. Therefore, even though the above notice to assignee requirement was not contained in or incorporated by reference into the contracts, the Department of the Army was required to comply with the above provision mandating notice of termination to all contract assignees. See *G. L. Christian and Associates v. The United States,* 312 F.2d 418 (Ct.Cl. 1963), cert. denied, 382 U. S. 821; *General Electric Co. v. Moretz,* 270 F.2d 780 (4th Cir. 1959); *U.S. v. New Orleans Public Health Service, Inc.,* 553 F.2d 459 (5th Cir. 1977).

As the Bank has emphasized, it is uncontroverted that the Department of the Army, as well as the SBA did not give *any* notice of contract termination to the Security Bank & Trust Company. Moreover, the Armed Service Procurement Regulations have the force of law. *Paul v. United States,* 371 U.S. 245, 9 L.Ed. 2d 292, 83 S. Ct. 426 (1963). The decision of the Court of Appeals effectively creates a double standard whereby the public must comply with valid government regulations but the government is not required to do so. In this instance, where the government has disregarded its own regulation which impinges upon due process rights, the judiciary must intervene to insure compliance with the law.

The injustice to the Bank is compounded by the act of the United States Army in awarding a thirty day contract

direct to Bluford for the month of September 1978. In this fashion, the Army created the circumstances which permitted Bluford to obtain the last $80,000.00 on September 22, 1978. The actions of the Army in cancelling Bluford's contract on August 24, 1978, (the proceeds of which were assigned to the Bank) and issuing a new contract to become effective seven days later, *to the identical contractor, for the identical services, and for the identical time covered by the cancelled contract,* defies explanation.

In addition to the Armed Services Procurement Regulation, the cases interpeting the Assignment of Claims Act have consistently held that the assignee of government contract rights is entitled to certain governmental protection of its interest. In *Mercantile National Bank at Dallas v. United States,* 280 F.2d 832 (Ct.Cl. 1960), the United States did not notify the assignee bank that future payment on an assigned contract would not be forthcoming. This resulted in the Bank making additional loans to the contracting party after the government's decision to make no more payments, and the failure of the contracting party to repay those loans. The Court of Claims determined that the amounts were improperly withheld under the terms of the contract and the Assignment of Claims Act. The Court further stated:

> "We think that when the government receives notice of such an assignment, it should have in mind the prime purpose of Congress in authorizing it, the purpose of enabling the government to get its supplies without itself advancing the money to finance their production. *If the government knows that the right of the contractor to receive payments is worthless because the contractor has already been paid, the government is under a duty to so advise the bank, so the*

> *bank will not lend its money on worthless collateral. If the government has the facilities for knowing that the collateral is worthless, and is unconscious of the fact only because of its carelessness in handling a public money, we think it may not take advantage of its own negligence and recoup its negligent overpayments by accepting supplies bought with money loaned by the assignee bank on the faith of the assignment.*" (Emphasis added).

Moreover, in *Central National Bank of Richmond, VA., v. United States,* 91 F.Supp. 738, (Ct.Cl. 1950), the Court concluded:

> "We can perceive of no good reason why the various offices to whom notice of assignments are to be given under the Act should not be held to the same degree of responsibility and liability as any others to whom such notices are given in everyday commercial transactions."

The Court of Appeals disregarded this long standing authority and its ruling fails to carry out the espoused purpose of the Assignment of Claims Act contrary to this Court's directives.

As Judge Bennett emphasized in dissent (App. A, infra, 18A-19A), this is a clear and classic case of a contract implied in fact that was breached by the government. Additionally, the vital facts establishing the existence of the implied in fact contract, as well as the government's breach, are admitted. Notwithstanding this, the Court of Appeals denied recovery by asserting that the implied contract covered only the period of the original subcontract beween the SBA and Mr. Bluford, which was terminated on August 31, 1978, although it was dated to expire by its own terms until September 30, 1978. It must be remembered that the Trial Judge entered a specific finding of fact that the Bank did not learn from any source about the termination of the prime contract and subcontract un-

til some time after October 17, 1978. (App. C, infra, 43A). Nevertheless, the Court of Appeals has chosen to scrutinize the Bank's actions after the ill-fated loan to impute constructive notice that something was wrong. App. A, infra, 14A).

The Court of Appeals' negligence theory completely ignores the uncontroverted fact that the government breached its own regulations and did not honor a written promise to provide immediate notice of contract termination. This decision is patently erroneous and effectively permits the government to disregard valid regulations and written promises. Indeed, we are not aware of any case which authorizes a court to overlook valid regulations. In fact, this Court in *Schweiker v. Hansen*, 450 U.S. 785, 67 L.Ed 2d 685, 101 S.Ct. 3023 specifically held:

> "Congress expressly provided in the Act (Social Security Act, 42 USCS § 402) that only one who 'has filed application' for benefits may receive them, and it delegated to petitioner the task of providing by regulation the requisite manner of Application. *A Court is no more authorized to overlook the valid regulation requiring that Applications be in writing, then it is to overlook any other valid requirement for the receipt of benefits.* (Emphasis added). (At 690).

In sum, nothing about this case supports the Court of Appeals' departure from the principles firmly established in the prior decisions of this Court. The decision below contravenes the constitutional guaranty of due process of law and completely undermines public confidence of the governmental process. Moreover, the claim of the government to immunity from liability is, in fact, a claim to exemption from the requirements of morals and justice. Our system of justice is premised on the concept of responsibility for one's own actions and this concept must

be applicable to the administrative branch of government in its dealings with the public in order to insure some minimum standard of decency, honor and reliability.

The issues presented by this case are very important. There are innumerable lending institutions involved in the private financing of government contracts and advance substantial sums of money based upon the strength of contract proceeds assignments. Furthermore, the banks rely upon the regulations published by the government agencies and have a reasonable expectation that the government will comply with its regulations. The willingness of the Court of Appeals to overlook the mandate of published regulations, as well as its failure to carry out the purpose of the Assignment of Claims Act, is a matte. of serious concern. The ancient concept of governmental immunity from wrongdoing is outmoded and unacceptable in our society. In deciding upon a policy applicable throughout the land, the judicial branch must have the last word as to the law, rather than administrative agencies. The Court of Appeals' erroneous decision thus warrants review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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September 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPEAL NO. 83-1267

THE SECURITY BANK & TRUST CO.,

Appellant,

v.

THE UNITED STATES,

Appellee.

DECIDED: April 5, 1984

Before BENNETT, *Circuit Judge,* SKELTON, *Senior Circuit Judge,* and MILLER, *Circuit Judge.*

SKELTON, *Senior Circuit Judge.*

This is an appeal from a decision of the Claims Court in No. 268-80C, *The Security Bank and Trust Co. v. U.S.*, decided June 6, 1983, — Cl.Ct. — (1983), in which the court held that the appellant Security Bank and Trust Co. is not entitled to recover on an alleged breach of contract claim. We affirm.

The Security Bank and Trust Co. of Lawton, Oklahoma, (appellant or plaintiff, or the Bank) filed this suit to recover money damages from the United States for an alleged breach of contract by the Small Business Administration (SBA) in connection with the SBA's section 8(a) program codified as 15 USC § 637(a)(1976). Under this program, various government contracts are set aside for socially or economically disadvantaged contractors. In

carrying out the program, government agencies enter into contracts with the SBA for the performance of services or the furnishing of supplies, and the SBA, in turn, subcontracts with disadvantaged firms to perform the services or furnish the supplies involved in the prime contracts. The facts in the instant case are substantially as follows.

As part of the section 8(a) program in the State of Oklahoma, the Department of the Army at Fort Sill, Oklahoma, on September 20, 1976, entered into contract No. DABT39-76-C-3164 ("the KP contract") for the performance of food services at Fort Sill. On October 1, 1976, the SBA entered into subcontract No. SB6328(a) 77C-700 ("the subcontract") with Bluford Services Company ("Bluford Services"), a disadvantaged firm owned and operated by Foxie M. Bluford ("Mr. Bluford"), for the performance of the same services involved in the KP contract. The KP contract and subcontract were originally to run from October 1, 1976, to September 30, 1977, but the term was later extended on three separate occasions, with the final termination date under the third extension being fixed as September 30, 1978.

Mr. Bluford, from the beginning of operations under the subcontract, suffered from a chronic lack of funds, and often had difficulty in covering his payroll. He survived "from payroll to payroll."

Sometime in March 1977, two representatives from the SBA and Mr. Bluford went to the Bank and conferred with Perman Henderson ("Mr. Henderson"), who was a loan officer and vice president of the Bank, concerning the possibility of the Bank extending a line of credit to Mr. Bluford in the amount of $80,000, so that Mr. Bluford

could meet his payroll in connection with the performance of the subcontract at Fort Sill. It was proposed that the collateral for any loans to be made under the line of credit would be an assignment to the Bank of the proceeds under the subcontract.

Mr. Henderson obtained a copy of Mr. Bluford's financial statement and a history of what had taken place in connection with the performance of the subcontract. He then submitted to the Bank's Discount Committee, with a favorable recommendation, an application from Mr. Bluford, d/b/a Bluford Services Company, for a line of credit in the amount of $80,000.

The Bank's Discount Committee approved Mr. Bluford's application, and an $80,000 line of credit was granted to Mr. Bluford, d/b/a Bluford Services Company. As extended, the line of credit remained in effect until September 30, 1978, which was the final date of the term of the KP contract and subcontract, as fixed in the last contract extension.

As security for the line of credit previously mentioned, Mr. Bluford on March 31, 1977, executed an assignment to the Bank of the subcontract proceeds. The Bank sent a notice of the assignment to the Department of the Army at Fort Sill, and the assignment was acknowledged by the contracting officer on April 6, 1977, and by the Fort Sill Finance Office on May 13, 1977.

After obtaining the line of credit, it was Mr. Bluford's practice to go to the Bank, talk to Mr. Henderson, ask for a loan in the amount of $80,000, and sign a promissory note for it. The money from the loan would be deposited in the payroll account of Bluford Services. This occurred

twice a month, with an interval of approximately 15-17 days between notes. Mr. Bluford was supposed to pay off any pending loan before receiving a new one.

Before the assignment of March 31, 1977, was executed by Mr. Bluford, checks due under the subcontract were made payable to Bluford Services and were mailed to Fort Sill to Mr. Bluford. After the assignment became effective, checks due under the subcontract were made payable to Bluford Services in care of the Bank, and were mailed by Fort Sill to the Bank.

When a check was received by the Bank from Fort Sill, payable to Bluford Services in care of the Bank, Mr. Henderson deposited the proceeds of the check in Mr. Bluford's payroll account, after deducting the amount due the Bank on the loan which the Bank had made for the period covered by the check. This customarily happened twice each month. Mr. Bluford would learn that a check had been received by the Bank because Mr. Henderson would call him on the telephone and inform him.

On or about February 25, 1978, by Modification No. 0025, the KP contract was modified to state in part as follows:

> By mutual agreement, this contract can be terminated for convenience of the Government in the event a contract is awarded in IFB DATB39-77-B-0066, Cook and KP service, Fort Sill, Oklahoma, at any time prior to the expiration of this contract as extended through 30 September 1978, and the effective date for a termination for convenience of the Government of Contract DABT39-76-C-3164 will be at the end of the month in which a new contract is awarded on IFB DABT39-77-B-0066.

On March 10, 1978, Robert K. Ball ("Mr. Ball"), who was then the Acting District Director of the SBA in the Oklahoma City District Office and the only official in that office with contracting authority, mailed to Mr. Henderson a copy of the contract modification quoted in the preceding paragraph. In a covering letter addressed to Mr. Henderson, Mr. Ball stated in part as follows:

> An extension of this contract through September 30, 1978 has just been executed on Modification No. 0025 (copy attached) between Fort Sill, SBA and Bluford. This extension was issued due to the fact that Fort Sill has not been able to award a contract to a responsible bidder on their IFB issued by them in July, 1977. It is our opinion that an award will not be made on this within the remaining period. If one is made, SBA and Bluford will be given at least a 30-day notice. If this does come into effect, this office will immediately notify you of the termination date.
>
> * * * Your bank has an assignment on this contract in which all monies are received at your bank prior to being received by Bluford. Bluford is paid twice a month, once on the 15th in which he receives $135,-000 for this period, and at the close of the month in which his check is for over $100,000. Your records at the bank should indicate this. Yoy may want to consider raising his line of credit to $100,000.

On or about August 24, 1978, the Department of the Army notified Bluford Services and the SBA that the KP contract and the subcontract would be terminated effective August 31, 1978.

Despite the promise contained in the SBA's letter of March 10, 1978, neither the SBA nor Mr. Bluford gave the Bank any notice, oral or written that the KP contract and subcontract would be terminated effective August 31, 1978. Moreover, neither the SBA nor Mr. Bluford gave

the Bank any notice, oral or written, that the KP contract and subcontract had been terminated effective August 31, 1978. The Bank did not learn from any source about the termination of the KP contract and subcontract until sometime after October 17, 1978.

On August 30, 1978, the Department of the Army at Fort Sill awarded a new food service contract directly to Mr. Bluford, d/b/a Bluford Services Company, for a 1-month period commencing September 1 and continuing through September 30, 1978. No formal assignment was executed with regard to this 1-month direct contract.

On September 8, 1978, Mr. Bluford went to the Bank and obtained a loan of $80,000 from Mr. Henderson. Then, on September 22, 1978, Mr. Bluford went to the Bank and obtained another $80,000 loan from Mr. Henderson without paying off the $80,000 loan he had obtained on September 8, 1978. This was contrary to the arrangement he had with the bank and also different from the custom and practice they had followed in the past, *i.e.*, a second $80,000 loan would not be made until and unless a previous $80,000 note was paid off. Furthermore, this second $80,000 loan was in excess of the line of credit of $80,000 the bank had approved for him. At this point in time (September 22, 1978) Mr. Bluford owed the bank $160,000, which was $80,000 more than his bank approved line of credit.

On September 25, 1978, Mr. Bluford went to the Bank with a check in the amount of $110,000 he had received from the Army at Fort Sill dated September 22, 1978, in part payment under the one-month September 1978, contract with the Army. This was the first time since the assignment that Mr. Bluford had personal possession of a

Fort Sill check without the express request and authorization of Mr. Henderson. This check was made payable as follows:

Bluford Services Company
P. O. Box 343
Lawton, Oklahoma 73501

This change in payee, addressee, and method of delivery was a deviation from a long-term pattern of more than 30 checks. However, Mr. Henderson did not call Fort Sill to inquire as to this deviation.

Mr. Bluford delivered the September 22, 1978, check in the sum of $110,000 he had received from the Army at Fort Sill to Mr. Henderson. Mr. Henderson had Mr. Bluford endorse the check, contrary to his practice with checks received under the assignment, which were always processed only with the Bank's endorsement stamp. Mr. Henderson deducted the amount of $80,000 in payment of the loan which the Bank had made to Mr. Bluford on September 8, 1978, and he credited the remainder to Mr. Bluford's payroll account. None of the remaining $30,000 from this check was paid to or applied by the Bank on the outstanding loan which the Bank had made to Mr. Bluford on September 22, 1978, in the sum of $80,000.

On October 10, 1978, the Fort Sill Finance Office of the Army delivered to Mr. Bluford a check in the amount of $85,378.84, representing the last payment for services under the one-month direct contract. Mr. Bluford used the proceeds from this check to purchase two cashier's checks, one in the amount of $50,000 and the other in the amount of $35,000. He used the $35,000 cashier's check to pay off a loan which he had previously obtained from the Sheppard Air Force Base Credit Union, and he deposited

the $50,000 cashier's check in his payroll account at the Bank. None of this $50,000 cashier's check was paid to or applied by the Bank on the outstanding $80,000 loan the bank had made to Mr. Bluford on September 22, 1978.

On October 17, 1978, after Mr. Henderson learned that Mr. Bluford had been injured in an automobile accident, he called the Department of the Army to inquire whether Mr. Bluford was due any more payments. At that time he learned for the first time about the termination of the assigned SBA contract and about the execution of the Army one-month direct contract with Mr. Bluford.

Thereafter, on November 6, 1978, the Bank filed an action against Mr. Bluford in the District Court of Comanche County, Oklahoma to recover the balance due on the September 22, 1978 loan of $80,000, and obtained a writ of attachment on Mr. Bluford's property. The Bank recovered approximately $5,800 from the sale of Mr. Bluford's janitorial equipment. However, the Bank did not apply these proceeds on the September 22, 1978 loan, but on a later loan made on October 10, 1978. On June 19, 1980, Mr. Bluford filed a voluntary petition in bankruptcy. However, he has not been discharged from his debt to the Bank.

The $80,000 loan the bank made to Mr. Bluford on September 22, 1978, has not been paid and it forms the basis of the bank's instant suit against the government.

The bank contends that an implied-in-fact contract was created between it and SBA when the SBA wrote the letter of March 10, 1978, in which it promised to immediately notify the bank of the termination date if the as-

signed contract was ever terminated. The bank says that this promise to the bank was made by SBA to induce the bank to continue making the $80,000 loans to Mr. Bluford, and that it relied on such promise and continued to make Mr. Bluford such loans. It alleges that the SBA tremi-nated the contract on August 31, 1978, without giving a notice of such termination to the bank, and the bank continued to make loans to Mr. Bluford up to and including September 22, 1978, when it made the last $80,000 loan to him which remains unpaid and cannot be collected. The bank argues that, by failing to give the termination notice, the SBA breached the contract and should be required to pay the bank the amount of the note as damages.

The government says that the promise of SBA to give the notice to the bank was only a gratuitous offer of assistance to the bank and was not sufficient to establish a legally binding contract, and, furthermore, there was no consideration furnished by the bank for the promise, since the bank never answered the letter nor made any promise nor did any act in response to the letter. The bank counters by saying that it continued to make the loans because of the SBA promise and that it would not have done so without it.

After a trial, the Claims Court found that an agreement had been made between the parties by the making of the termination notice promise by the SBA on the one hand and by the continued making of loans by the bank to Mr. Bluford on the other hand. The court found further that the SBA failed to give the termination notice to the bank when it terminated the contract for the convenience of the government on August 31, 1978, although it did

notify Mr. Bluford of the termination, but he did not inform the bank.

The Claims Court made the following pertinent findings of fact, among others, on these events:

> In the present case, there was clearly a promise made by the SBA, but the scope of the promise and the return promise or performance (if any) which the SBA bargained for in exchange for the promise require discussion. Ostensibly, the promise, as set out in the SBA's letter of March 10, 1978, was to "immediately notify * * * [the Bank] of the termination date" in the event of the termination of the KP contract and subcontract for the convenience of the Government. This specific promise, however, was part of a larger whole.
>
> The letter of March 10, 1978, as previously quoted, was obviously designed to induce the Bank to continue making loans to Mr. Bluford in connection with the performance of the subcontract, by reassuring the Bank that is would not sustain any financial loss by making such loans, because (1) under the assignment of the subcontract proceeds, the Bank would directly receive all payments due under the subcontract; and (2) as further protection for the Bank, the SBA would immediately notify the Bank if a decision to terminate the KP contract and subcontract were to be made before the expiration of the extended contract date of September 30, 1978. In essence, therefore, the SBA was bargaining for performance, rather than a promise, by the Bank *(i.e.,* the continued making of loans to Mr. Bluford in order that the subcontract might be completed) in exchange for the SBA's assurance that the Bank would receive repayment for such loans.
>
> The SBA was interested in, and only in, the continued making of loans by the Bank to Mr. Bluford in connection with the completion of the subcontract.

Notwithstanding these findings, the Claims Court held that under the peculiar facts of this case the event described above did not create any legal liability on the part of the government to pay damages to the bank because of its failure to give the termination notice. In this regard, the court made additional findings as follows:

> Nowhere in the letter of March 10, 1978, was there any express or implied request that the Bank do anything by way of rendering financial assistance to Mr. Bluford in connection with any other contract or subcontract (such as the September 1978 1-month direct contract between Fort Sill and Mr. Bluford). Conversely, there was no express or implied assurance in the letter that the Bank would be repaid for loans made in connection with other contracts or subcontracts. Accordingly, the loan which the Bank made to Mr. Bluford on September 22, 1978, and on which the present action is based, was outside the scope of the agreement between SBA and the Bank arising from the letter of March 10, 1978.
>
> The Bank was fully repaid for all loans which it made to Mr. Bluford in connection with the performance of the subcontract.

After making these findings, the court concluded:

> It necessarily follows that the Bank's damages claim based upon an alleged breach of contract by the SBA cannot be sustained.

After carefully considering the decision of the Claims Court, the briefs and oral argument of the parties, we have concluded that, under all of the facts and circumstances in the case, the failure of the SBA to give notice of the termination of the assigned subcontract to the bank did not make the government legally liable to pay the bank the $80,000 due on the loan the bank made to Mr.

Bluford on September 22, 1978. This is so for a number of reasons shown below.

In the first place, the bank as assignee of the subcontract received all of the funds paid by the government to Mr. Bluford for work done under the subcontract. The trial judge found that the bank was fully repaid for all loans which it made to Mr. Bluford in connection with the performance of the subcontract. This finding is fully supported by the evidence. Such full payment to the bank was the extent of liability of the government and discharged it from further liability under the assignment.

In the second place, as found by the trial judge, the $80,000 loan the bank made to Mr. Bluford on September 22, 1978, was outside the scope of the agreement between the SBA and the bank arising from the letter of March 10, 1978. There was nothing in that letter that either expressly or impliedly requested the bank to do anything by way of rendering financial assistance to Mr. Bluford in connection with any other contract or subcontract. Conversely, there was no express or implied assurance in the letter that the bank would be repaid for loans made in connection with other contracts or subcontracts. It appears from the evidence that the September 22, 1978, loan to Mr. Bluford was used by him in performance of the one-month contract between the Army and Mr. Bluford in which the SBA was not even involved, and which contract was not assigned to the bank. That contract was completely outside of the assigned subcontract, and the September 22, 1978, loan by the bank was in no way secured in its payment by the subcontract. Consequently, the loan was used in the performance of a contract other than the assigned subcontract, was unsecured, and was

made without any privity of contract between the bank and the Army. Under these circumstances the government is not liable for the payment of the note.

In the next place, the loan of September 22, 1978, was outside the $80,000 line of credit approved by the bank for Mr. Bluford and was made at a time when he was already indebted to the bank for an $80,000 loan the bank had made to him on September 8, 1978. This resulted in a total indebtedness of $160,000 that Mr. Bluford owed the bank. Thus, it appears that the September 22, 1978, loan was not only unauthorized but also was contrary to the tacit understanding between the bank, the SBA and Mr. Bluford that no $80,000 loan would be made until and unless the previous loan in that amount had first been paid. This was the custom and practice theretofore followed by the bank in making thirty different loans in said amount to Mr. Bluford during his performance of the assigned subcontract. Had the bank not made the September 22, 1978, loan and thereby deviated from its understanding with the SBA and Mr. Bluford, as well as its past practice and custom in making these loans, and the line of credit authorization limitation of the bank, it would not have sustained the loss it now claims on that loan which remains unpaid. The government should not be held responsible for such negligent management by the bank of its financial affairs.

Finally, other facts should be mentioned which show that the $80,000 loss the bank claims it has suffered on the unpaid September 22, 1978, loan to Mr. Bluford was the result of the bank's own mismanagement and negligence in failing to apply funds on deposit in the bank in Mr.

Bluford's account to the payment of the note. The record shows that from the date the subcontract was assigned to the bank by Mr Bluford on March 31, 1977, until the date of the bank's last loan to him on September 22, 1978, 30 checks were issued by the Army at Fort Sill in connection with the work under the subcontract. Each of these checks was made payable to Mr. Bluford with the name of the bank inscribed thereon. Each check was sent to the bank and not to Mr. Bluford. The bank would process the check with a bank deposit stamp, pay off any unpaid $80,000 note, and notify Mr. Bluford the check had arrived. So far as the record shows, Mr. Bluford never saw the checks. Then on September 25, 1978, the procedure suddenly changed. On that date Mr. Bluford received a check in the sum of $110,000 in the mail from the Army at Fort Sill made out to him personally and without the bank's name being on the check. Mr. Bluford took the check to the bank and delivered it to Mr. Henderson, the bank official who had handled the account from the beginning. Mr. Henderson had Mr. Bluford endorse the check instead of using the bank's deposit stamp. This was the first time all this had occurred and was a radical departure from the procedure followed in the past. Mr. Henderson paid off the $80,000 loan the bank had made to Mr. Bluford on September 8, 1978, but instead of applying the remaining $30,000 of the check to the unpaid $80,000 loan the bank had made to Mr. Bluford on September 22, 1978, he deposited it in the account of Mr. Bluford for him to spend as he pleased. In our opinion, the foregoing incidents were constructive notice to Mr. Henderson that something was wrong and that a change had been made in the administration of the assigned sub-

contract. He was at least put on inquiry to find out about the situation. While knowledge of these events on September 25, 1978, could not have prevented the bank's loan to Mr. Bluford of $80,000 made three days earlier, such knowledge should have been sufficient warning to Mr. Henderson to alert him to the necessity or at least the precautionary desirability of applying the $30,000 remaining balance of the $110,000 check, as well as a $50,000 cashier's check described below, to the payment of the outstanding $80,000 note here involved. Yet he did nothing to reduce or pay off the note. He did not even inquire of the Army at Fort Sill or of the SBA at that time to find out why the payment procedure had been changed. On October 10, 1978, Mr. Bluford received another check in the sum of $85,378.84 directly from the Army at Fort Sill made payable to him and without the bank's name on the check. He purchased two cashier's checks, one for $50,000 and the other for $35,000. He went to the bank and delivered the $50,000 cashier's check to Mr. Henderson, who, instead of applying it on the $80,000 loan of September 22, 1978, deposited it in Mr. Bluford's checking account. Thus, it is clear that Mr. Henderson had control of the $30,000 from the first check and the $50,000 cashier's check and could have used them to completely pay off the $80,000 unpaid note which is the subject matter of this suit, yet he failed to do so. His negligence in this regard resulted in the complained of loss to the bank. The government should not be required to pay for this negligence of the bank and its officers.

The trial judge found that on November 16, 1978, the bank filed suit in the District Court of Comanche County, Oklahoma, against Mr. Bluford on the $80,000 note he had

executed to the bank on September 22, 1978, and sought as relief a writ of attachment on his property, as well as a judgment against Mr. Bluford for $80,000, plus interest, attorney fees and costs. On February 22, 1979, the bank recovered a judgment in the suit against Mr. Bluford, and his property was sold at public auction under the writ of attachment. The sum of $5,800 was realized from the public auction sale, but the proceeds of the sale were not applied to the $80,000 loan of September 22, 1978, nor to the judgment recovered thereon in the suit, but were applied by the bank to a later loan which the bank had made on October 10, 1978, to Mr. Bluford, and which was secured by an assignment under another and different contract. The later loan was not involved in the suit. The act of the bank in this regard was rather unorthodox, because ordinarily when a litigant sues on a note and recovers a judgment and foreclosure of a lien on property which is sold at public auction, the proceeds of the sale are applied as a credit on the judgment and debt sued on and are not, and perhaps cannot be, applied on an entirely different debt not sued on as the bank attempted to do here. It is obvious that the bank tried deliberately and willfully by this maneuver to impose a debt on the government which it did not owe. While this transaction does not influence our decision in the instant case, it does indicate that, although the bank has accused the government of negligent wrongdoing throughout these proceedings, it appears that the bank itself did not always turn square corners in its dealings with the government.

The bank alleges that it did not receive any governmental protection of its interest under the Assignment of Claims Act, 31 U.S.C. § 3727 and 41 U.S.C. § 15. How-

ever, it does not make clear where or how the government failed to protect it under these statutes. All that this Act requires of the government is that it pay all amounts to the assignee that are payable under the assigned contract which have not already been paid. This was done in the instant case. The complaint is without merit.

The bank also alleges that judgment for the $80,000 should be entered in its behalf because the Army violated the Armed Service Procurement Regulation, 32 C.F.R. 8-203(b), by failing to give the termination notice to the assignee bank. The regulation provides that notice of termination of contracts which are terminated for the convenience of the government shall be provided by the procuring department to each known assignee. This contention is likewise without merit.

The procurement regulation nowhere mandates nor provides for the payment of compensation by the government to an assignee if the government violates the regulation. Therefore, no recovery can be had against the government on such a claim.

As the Court of Claims said in *Eastport S.S. Corp. v. United States,* 372 F.2d 1002, 1008 (1967), cited approvingly in *United States v. Testan,* 424 U.S. 392, 402 (1976):

> Where the claimant is not suing for money improperly exacted or retained . . . the historical boundaries of our competence have excluded those instances in which the basis of the federal claim—be it the Constitution, a statute, or a regulation—cannot be held to command, in itself and as correctly interpreted, the payment of money to the claimant.

We find it unnecessary to consider other contentions made by the bank.

We wish to emphasize that we do not condone nor approve of the failure of the Army and the SBA to give the bank the notice that the contract had been terminated even though such failure imposed no liability on the government under all the facts and circumstances of this case. We agree with the Claims Court that as a matter of common courtesy and to retain the confidence of the public in the integrity of the government in its dealings with private citizens, the SBA should have given the notice to the bank.

The decision of the Claims Court dismissing the complaint is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPEAL NO. 83-1267

THE SECURITY BANK & TRUST CO.,

Appellant,

v.

THE UNITED STATES,

Appellee.

BENNETT, *Circuit Judge,* dissenting.

I respectfully dissent because to me this is a clear and classic case of a contract implied in fact that has been breached by the government. Mr. Robert Ball, a government agent with authority to contract, made a written promise to the Bank to induce it to continue to extend credit to the contractor. Foxie Bluford, something it was

otherwise reluctant to do because of his questionable financial condition. Mr. Ball promised that if there was a contract termination the Bank would be notified immediately. The promise was not kept. The Bank continued to extend credit in direct consideration of the government's written offer and by so doing lost $80,000. These vital facts are admitted. The Bank, therefore, is entitled to recover, less the sum of $5,800 it has obtained as a result of a state court judgment against the contractor.

In addition, the government breached its own Armed Services Procurement Regulation (ASPR), 32 C.F.R. § 8-203(b) (1976), which provides that notice of termination of contracts, for the convenience of the government, must be provided by the procuring department to each known assignee. The ASPR is made applicable to SBA section 8(a) contracts by 32 C.F.R. § 1-705.5(c) (1) (J) (1976). The majority opinion takes the position, however, that a breach of regulations does not give rise to a claim for money and thus recovery is barred, citing *United States v. Testan*, 424 U.S. 392 (1976). This case does not support the majority's position. *Testan* was a claim of improper classification by civil service employees. The determination of their claim required an interpretation of the Classification Act and the Back Pay Act. It had nothing to do with contract law. It is hornbook law that the rights and positions of government employees derive from their appointment under statute, regulation, and Executive order. *Testan* made this clear and further pointed out that the claim in that case was not based on contract. 424 U.S. at 400.

The present claim comes to us on appeal from the Claims Court which has jurisdiction over government con-

tracts "express or implied" under its Tucker Act jurisdiction, 28 U.S.C. § 1491, *amended by* the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. We review under the latter. In short, where there is a government contract, express or implied in fact, the Claims Court has jurisdiction and the government is equitably estopped to deny its obligations under such contract. *Russell Corp. v. United States,* 537 F.2d 474 (Ct. Cl. 1976) (equitable estoppel will be invoked to prevent the United States from denying existence of contractual agreement); *Manloading & Management Associates v. United States,* 461 F.2d 1299 (Ct. Cl. 1972) (government estopped from disavowing promise regarding renewal of contract); *Sylvania Electric Products, Inc. v. United States,* 458 F.2d 994 (Ct. Cl. 1972) (government estopped from disavowing oral understanding reached at bidders' conference). This is also the accepted view of other circuits, as shown from the uncontested authorities cited in appellant's brief.

Although the majority, therefore, in my view is wrong in its holding that violation of the regulation is meaningless and without a remedy, it is not necessary for appellant to recover to show that the government is estopped from making its argument about this regulation. It is sufficient to show that there is a valid implied contract here (the Claims Court did not deny that there was consideration for it) and that it was breached.

The majority view would deny recovery for this breach by arguing that the implied contract covered only the period of the original subcontract between the SBA and Foxie Bluford which was terminated on August 31, 1978, although it was not due to expire by its own terms until September 30, 1978. The Bank did not learn of the

termination until after the middle of October because the SBA did not keep its promise to let the Bank know "immediately" if there was an early termination. The loan in issue here was made on September 22, 1978, while a one-month contract, not an extension of the earlier contract, was in effect, and at a time the Bank assumed, absent information from the SBA to the contrary, that the original contract was still in effect until September 30. Is it not strange to assert, as does the majority opinion affirming the Claims Court, that the SBA had an obligation to inform the Bank of a termination within the period of the original contract, but that the secret (to the Bank) termination of the contract by the government discharged any possible liability for the abrogation of its duty to inform the Bank if the contract was terminated? In effect, both the Claims Court and this court recognize an obligation on the part of the SBA that, in practice, is absolutely meaningless.

Finally, it is noted that the majority opinion says that the Army and the SBA should have given notice to the Bank, although not legally responsible for not doing so. The practical effect of this is to send a message to the public that you cannot trust the government, that you must assume that it will not keep its authorized, written promises, and that it will ignore with impunity its published regulations. The majority opinion is that, in believing otherwise, the Bank was negligent and cannot recover on that account. I had thought that the government was held to a higher standard and that it must turn "square corners" in dealing with the citizen. The Claims Court opinion, affirmed now on appeal, although denying any recovery, says that "[t]he Bank has reason to feel aggrieved." Indeed!

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 83-1267

THE SECURITY BANK & TRUST CO.,

Appellant,

v.

THE UNITED STATES,

Appellee.

ORDER

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

Circuit Judge Bennett would grant both the petition for rehearing and the suggestion for rehearing in banc.

FOR THE COURT,
/s/ George E. Hutchinson
George E. Hutchinson, Clerk

May 30, 1984
Date

cc:Edward W. Dzialo, Jr.
Margaret E. McCloskey

APPENDIX C

IN THE UNITED STATES CLAIMS COURT

No. 268-80C

(Decided June 6, 1983)

THE SECURITY BANK & TRUST CO.

v.

THE UNITED STATES

Contracts; consideration; alleged breach; Small Business Administration; disadvantaged contractors; assignments; termination for convenience of Government; notice.

Ralph W. Newcombe, Lawton, Oklahoma, for plaintiff. *Newcombe & Redman, Inc.,* of counsel.

Margaret E. McCloskey, Washington, D.C., for defendant. *Assistant Attorney General J. Paul McGrath,* of counsel.

MEMORANDUM OF DECISION

WHITE, *Senior Judge.*

The Security Bank & Trust Company ("the Bank" or "the plaintiff"), which is located in Lawton, Oklahoma, bases this action upon an alleged breach of contract by the Small Business Administration ("the SBA").

The court concludes that the plaintiff is not entitled to recover.

The KP Contract and Subcontract

The events upon which the action is based arose in connection with the SBA's so-called section 8(a) program.[1] Under the section 8(a) program, various govern-

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[1] The legislation authorizing the program was codified as 15 U.S.C. § 637(a) (1976).

ment contracts are set aside for socially or economically disadvantaged contractors. In carrying out the program, government agencies enter into contracts with the SBA for the performance of services or the furnishing of supplies, and the SBA, in turn, subcontracts with disadvantaged firms to perform the services or furnish the supplies involved in the prime contracts.

As part of the section 8(a) program in the State of Oklahoma, the Department of the Army at Fort Sill, Oklahoma, on September 20, 1976, entered into contract No. DABT39-76-C-3164 ("the KP contract") for the performance of food services at Fort Sill. Then, on October 1, 1976, the SBA entered into subcontract No. SB6328(a) 77C-700 ("the subcontract") with Bluford Services Company ("Bluford Services"), a disadvantaged firm owned and operated by Foxie W. Bluford ("Mr. Bluford"), for the performance of the same services involved in the KP contract. The KP contract and subcontract were originally to run from October 1, 1976, to September 30, 1977, but the term was later extended on three separate occasions, with the final termination date under the third extension being fixed as September 30, 1978.

Mr. Bluford, from the beginning of operations under the subcontract, suffered from a chronic lack of funds, and often had difficulty in covering his payroll. He survived "from payroll to payroll."

Sometime in March 1977, two representatives from the SBA and Mr. Bluford went to the Bank and conferred with Perman Henderson ("Mr. Henderson"), who was a loan officer and vice president of the Bank, concerning

the possibility of the Bank extending a line of credit to Mr. Bluford in the amount of $80,000, so that Mr. Bluford could meet his payroll in connection with the performance of the subcontract at Fort Sill. It was proposed that the collateral for any loans to be made under the line of credit would be an assignment to the Bank of the proceeds under the subcontract.

The Bank, for some time, had been very cooperative toward the SBA and had rendered assistance to the SBA in connection with its operations in Oklahoma. Mr. Henderson obtained a copy of Mr. Bluford's financial statement and a history of what had taken place in connection with the performance of the subcontract. He then submitted to the Bank's Discount Committee, with a favorable recommendation, an application from Mr. Bluford, d/b/a Bluford Services Company, for a line of credit in the amount of $80,000.

The Bank's Discount Committee approved Mr. Bluford's application, and an $80,000 line of credit was granted to Mr. Bluford, d/b/a Bluford Services Company. As extended, the line of credit remained in effect until September 30, 1978, which was the final date of the term of the KP contract and subcontract, as fixed in the last contract extension.

As security for the line of credit previously mentioned, Mr. Bluford on March 31, 1977, executed an assignment to the Bank of the subcontract proceeds. The Bank sent a notice of the assignment to the Department of the Army at Fort Sill, and the assignment was acknowledged by the contracting officer on April 6, 1977, and by the Fort Sill Finance Office on May 13, 1977.

After obtaining the line of credit, it was Mr. Bluford's practice to go to the bank, talk to Mr. Henderson, ask for a loan in the amount of $80,000, and sign a promissory note for it. The money from the loan would be deposited in the payroll account of Bluford Services. This occurred twice a month, with an interval of approximately 15-17 days between notes. Mr. Bluford was supposed to pay off any pending loan before receiving a new one.

Before the assignment of March 31, 1977, was executed by Mr. Bluford, checks due under the subcontract were made payable to Bluford Services and were mailed by Fort Sill to Mr. Bluford. After the assignment became effective, checks due under the subcontract were made payable to Bluford Services in care of the Bank, and were mailed by Fort Sill to the Bank.

When a check was received by the Bank from Fort Sill, payable to Bluford Services in care of the Bank, Mr. Henedrson deposited the proceeds of the check in Mr. Bluford's payroll account, after deducting the amount due the Bank on the loan which the Bank had made for the period covered by the check. This customarily happened twice each month. Mr. Bluford would learn that a check had been received by the Bank because Mr. Henderson would call him on the telephone and inform him.

On or about February 25, 1978, by Modification No. 0025, the KP contract was modified to state in part as follows:

> By mutual agreement, this contract can be terminated for convenience of the Government in the event a contract is awarded on IFB DABT39-77-B-0066, Cook and KP service, Fort Sill, Oklahoma, at any time prior to the expiration of this contract as extended

through 30 September 1978, and the effective date for a termination for convenience of the Government of Contract DABT39-76-C-3164 will be at the end of the month in which a new contract is awarded on IFB DABT39-77-B-0066.

The Promise

On March 10, 1978, Robert K. Ball ("Mr. Ball"), who was then the Acting District Director of the SBA in the Oklahoma City District Office and the only official in that office with contracting authority, mailed to Mr. Henderson a copy of the contract modification quoted in the preceding paragraph. In a covering letter addressed to Mr. Henderson, Mr. Ball stated in part as follows:

> An extension to this contract through September 30, 1978 has just been executed on Modification No. 0025 (copy attached) between Fort Sill, SBA and Bluford. This extension was issued due to the fact that Fort Sill had not been able to award a contract to a responsible bidder on their IFB issued by them in July, 1977. It is our opinion that an award will not be made on this within the remaining period. If one is made, SBA and Bluford will be given at least a 30-day notice. If this does come into effect, this office will immediately notify you of the termination date.
>
> * * * Your bank has an assignment on this contract in which all monies are received at your bank prior to being received by Bluford. Bluford is paid twice a month, once on the 15th in which he receives $135,000 for this period, and at the close of the month in which his check is for over $100,000. Your records at the bank should indicate this. You may want to consider raising his line of credit to $100,000.

Termination for Convenience of Government

On or about August 24, 1978, the Department of the Army notified Bluford Services and the SBA that the KP contract and the subcontract would be terminated effective August 31, 1978.

Despite the promise contained in the SBA's letter of March 10, 1978, neither the SBA nor Mr. Bluford gave the Bank any notice, oral or written, between August 24 and August 31, 1978, that the KP contract and subcontract would be terminated effective August 31, 1978. Moreover, neither the SBA nor Mr. Bluford gave the Bank any notice, oral or written, during the month of September 1978 that the KP contract and subcontract had been terminated effective August 31, 1978. In fact, the Bank did not learn from any source about the termination of the KP contract and subcontract until sometime after October 17, 1978. Consequently, throughout the month of September, the Bank proceeded in the belief that the KP contract and subcontract would continue in existence until the regularly scheduled termination date of September 30, 1978.

On August 30, 1978, the Department of the Army at Fort Sill awarded a new food service contract directly to Mr. Bluford, d/b/a Bluford Services Company, for a 1-month period commencing September 1 and continuing through September 30, 1978. No formal assignment was executed with regard to this 1-month direct contract.

On September 8, 1978, Mr. Bluford went to the Bank and obtained a loan of $80,000 from Mr. Henderson. Then, on September 22, 1978, Mr. Bluford went to the Bank and obtained another $80,000 loan from Mr. Henderson. Both

of these loans were made under the $80,000 line of credit mentioned earlier in the opinion. When they were made, Mr. Henderson believed that the KP contract and subcontract were still in effect, and that the Bank was protected by the March 31, 1977, assignment to the Bank of the subcontract proceeds.

The $80,000 loan of September 22, 1978, was never repaid by Mr. Bluford, and it is the basis for this action.

The Bank was fully repaid for all loans which it made to Mr. Bluford in connection with the performance of the subcontract. All checks in payment for services rendered under the subcontract were made payable to Bluford Services in care of the Bank and were mailed to the Bank, which made a deduction from each check to cover the loan for the period represented by the payment, and deposited the remainder of the proceeds from the check to Mr. Bluford's payroll account. Also, the $80,000 loan which the Bank made to Mr. Bluford on September 8, 1978, was paid off on September 25, 1978, with part of the proceeds from a Fort Sill check to Bluford Services, which was in payment for work done under the September 1978 1-month direct contract between Fort Sill and Mr. Bluford. This check was made payable to, and was mailed directly to, Bluford Services, and was taken by Mr. Bluford to the Bank, where it was handled in the customary manner by Mr. Henderson *(i.e.,* he deducted the amount due the Bank on the September 8 loan and deposited the remainder of the proceeds in Mr. Bluford's payroll account).

Discussion

In its requested findings of fact, the defendant asked (among other things) that the court make findings to the

effect that "[t]he Bank did not promise or do anything for the SBA in return for Mr. Ball's statement in the March 10, 1978 letter that the SBA would give the Bank notice of a termination for convenience," and that "neither Mr. Ball nor any other individual at the SBA received any promise or act in return or response to its letter of March 10, 1978."

Then, in its brief, the defendant stated in part as follows:

> Thus, here, the fact that consideration, an essential element of a contract, was lacking is fatally defective to the Bank's alleged contract theory. * * * The SBA's letter, at best, made a gratuitous goodwill offer of assistance, which is not sufficient to establish a legally obligatory contract. * * *

As stated by the defendant, consideration is an essential ingredient of a contract. *Farrington v. Tennessee,* 95 U.S. 679, 685 (1877). To constitute consideration, a performance or a return promise must be bargained for. RESTATEMENT (SECOND) OF CONTRACTS § 71(1).

This court's predecessor, the U.S. Court of Claims, in *Estate of Samuel E. Bogley v. United States,* 206 Ct.Cl. 695, 514 F. 2d 1027 (1975), used the following language in summarizing the essential elements of a contract (206 Ct. Cl. at 704, 514 F. 2d at 1032):

> It is fundamental that in order to have a valid contract one party must make an offer that is a promise which is conditional upon receipt by the offeror of some act or promise [*i.e.*, consideration] from the offeree, and the offer must be accepted as to all its terms by the offeree. * * *

In the present case, there was clearly a promise made by the SBA, but the scope of the promise and the return

promise or performance (if any) which the SBA bargained for in exchange for the promise require discussion. Ostensibly, the promise, as set out in the SBA's letter of March 10, 1978, was to "immediately notify * * * [the Bank] of the termination date" in the event of the termination of the KP contract and subcontract for the convenience of the Government. This specific promise, however, was part of a larger whole.

The letter of March 10, 1978, as previously quoted, was obviously designed to induce the Bank to continue making loans to Mr. Bluford in connection with the performance of the subcontract, by reassuring the Bank that it would not sustain any financial loss by making such loans, because (1) under the assignment of the subcontract proceeds, the Bank would directly receive all payments due under the subcontract; and (2) as further protection for the Bank, the SBA would immediately notify the Bank if a decision to terminate the KP contract and subcontract were to be made before the expiration of the extended contract date of September 30, 1978. In essence, therefore, the SBA was bargaining for performance, rather than a promise, by the Bank (*i.e.*, the continued making of loans to Mr. Bluford in order that the subcontract might be completed) in exchange for the SBA's assurance that the Bank would receive repayment for such loans.

The SBA was interested in, and only in, the continued making of loans by the Bank to Mr. Bluford in connection with the completion of the subcontract. Nowhere in the letter of March 10, 1978, was there any express or implied request that the Bank do anything by way of rendering financial assistance to Mr. Bluford in connection

with any other contract or subcontract (such as the September 1978 1-month direct contract between Fort Sill and Mr. Bluford). Conversely, there was no express or implied assurance in the letter that the Bank would be repaid for loans made in connection with other contracts or subcontracts. Accordingly, the loan which the Bank made to Mr. Bluford on September 22, 1978, and on which the present action is based, was outside the scope of the agreement between the SBA and the Bank arising from the letter of March 10, 1978.

It necessarily follows that the Bank's damages claim based upon an alleged breach of contract by the SBA cannot be sustained.

When Mr. Bluford went to the Bank on September 22, 1978, and asked for another loan in the customary amount of $80,000, and said nothing about the termination of the KP contract and subcontract on which the SBA had assisted him in obtaining the $80,000 line of credit from the Bank, his silence on this point was, in substance, a misreprestntation to the Bank that he was still working on the subcontract. This misrepresentation was the basic cause of the Bank's loss in connection with the $80,000 loan of September 22, 1978.

Despite the conclusion that the Government is not legally obligated to reimburse the Bank, on a breach of contract theory, for any loss sustained in connection with the September 22, 1978, loan to Mr. Bluford, the fact remains that the SBA—perhaps as an obligation to use due care to avoid causing harm to the interests of others,[2] and

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[2] Cases "sounding in tort" are excluded from this court's jurisdiction by 28 U.S.C. § 1491, *as amended by* section 133(a) of the Federal Courts Improvement Act of 1982 (Pub. L. 97-164, 96 Stat. 25, 39).

at least as a matter of common courtesy and a desire to retain the confidence of the public in the integrity of the agency—should have given the Bank timely notice regarding the termination of the KP contract and subcontract. The Bank, in the absence of such notice, ultimately sustained a financial loss on the $80,000 loan of September 22, 1978, which the Bank would not have made if it had known that the KP contract and subcontract, and, therefore, the assignment of the subcontract proceeds, had been terminated. The Bank has reason to feel aggrieved.

CONCLUSION OF LAW

On the basis of the foregoing opinion and the facts, as found by the court and stated in the opinion and in the contemporaneous findings of fact, the court concludes as a matter of law that the plaintiff is not entitled to recover.

The complaint will therefore be dismissed.

IT IS SO ORDERED.

THE SECURITY BANK AND TRUST CO.

No. 268-80C

FINDINGS OF FACT

Cast of Characters

1. Perman Henderson ("Mr. Henderson") is a loan officer and vice president at The Security Bank & Trust Company ("the Bank") in Lawton, Oklahoma. He held these positions during the 1974-78 period. His duties are to make loans and collect them. He has been employed by the Bank for approximately 32 years. During part of that period, he was a teller. As a teller, he was

trained to look at checks for a variety of purposes, and one purpose was to determine who endorsed the check.

2. Robert K. Ball ("Mr. Ball") is the District Director of the United States Small Business Administration ("SBA") in the Oklahoma City District Office. He is generally responsible for the SBA operations in the State of Oklahoma. He has held the position since June 1980. During March 1978, Mr. Ball was the Acting District Director.

3. (a) Jack Rylant ("Mr. Rylant") was employed by the SBA as a business specialist in their section 8(a) program (see finding 7(c)). In this capacity, he handled Foxie W. Bluford's Section 8(a) subcontract with the SBA at Fort Sill, Oklahoma. Mr. Rylant did not have contracting authority to act on behalf of the SBA.

(b) Mr. Rylant was under Mr. Ball's supervision at the times relevant to this case.

4. (a) Foxie W. Bluford ("Mr. Bluford") is now employed as a food service supervisor at Sheppard Air Force Base, Texas. During the 1976-78 period, he was self-employed and was operating a food service business through his corporation known as Bluford Services Company.

(b) Before forming Bluford Services Company, Mr. Bluford operated through a company known as Triple S Enterprises, Inc. He was sopnsored and financed at that time by ABC Food Service, a Texas company.

Mr. Bluford and the Bank

5. (a) Mr. Bluford, doing business as Bluford Services Company ("Bluford Services") and, earlier, as

Triple S Enterprises, Inc. ("Triple S"), did business with the Bank beginning in July 1974. Their first relationship was in connection with a $150,000 direct loan to Mr. Bluford from the Dallas office of the SBA. That loan was handled by the Bank (without charge) on behalf of the SBA.

(b) In July 1975, Mr. Bluford received another direct loan from the Dallas SBA office for $300,000. Again, the loan was handled through the Bank (which did not make any charge).

(c) Mr. Bluford continued to do business with the Bank through October 1978.

(d) From the beginning, and throughout the course of his dealings with the Bank, Mr. Bluford normally dealt with Mr. Henderson.

6. With respect to the transactions mentioned in finding 5, the Bank experienced problems in making collections from Mr. Bluford and transmitting the money to the SBA, as Mr. Bluford was constantly getting himself into financial "jams."

The Contract and Subcontract

7. (a) On September 20, 1976, the SBA and the Department of the Army at Fort Sill, Oklahoma, entered into contract No. DABT 39-76-C-3164 ("the prime contract") for the performance of food services (sometimes referred to as "KP" services) at Fort Sill.

(b) On October 1, 1976, the SBA entered into subcontract No. SB6328(a)77C-700 ("the subcontract") with Bluford Services, a disadvantaged firm, for the per-

formance of the same services involved in the prime contract.

(c) The actions mentioned in paragraphs (a) and (b) of this finding were undertaken as part of the SBA's Section 8(a) program,[1] in which various government contracts are set aside for socially or economically disadvantaged contractors. The program is carried out by means of government agencies extending contracts to the SBA, and the SBA, in turn, subcontracting with disadvantaged firms to perform the services or furnish the supplies involved in the prime contracts.

(d) The subcontract did not involve any SBA guaranteed funds.

8. The work under the price contract and the subcontract was performed solely by Mr. Bluford, d/b/a Bluford Services.

9. The prime contract and the subcontract were originally to run from October 1, 1976, to September 30, 1977. They were then extended to November 30, 1977, and, later, to February 28, 1978. On or before February 28, 1978, the contract and the subcontract were extended again to September 30, 1978.

10. Mr. Bluford, from the beginning of operations under the subcontract, suffered from a chronic lack of funds, and often had difficulty in covering his payroll. He survived "from payroll to payroll." Mr. Henderson was aware of this.

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[1] The pertinent legislation was codified as 15 U.S.C. § 637 (a) (1976).

The Line of Credit and Assignment

11. (a) Sometime in March 1977, a representative of the Dallas SBA office, a representative of the Oklahoma City SBA office, and Mr. Bluford went to the Bank and conferred with Mr. Henderson concerning the possibility of the Bank extending a line of credit to Mr. Bluford in the amount of $80,000, so that Mr. Bluford could meet his payroll in connection with the performance of the subcontract at Fort Sill. It was proposed that the collateral for any loans to be made under the line of credit would be an assignment to the Bank of the proceeds under the subcontract.

(b) The Bank, for some time, had been very cooperative toward the SBA and had rendered assistance to the SBA in connection with the latter's operations in Oklahoma.

12. (a) Mr. Henderson obtained a copy of Mr. Bluword's financial statement and a history of what had taken place in connection with the performance of the subcontract. He then submitted to the Bank's Discount Committee, with a favorable recommendation, an application from Mr. Bluford, d/b/a Bluford Services Company, for a line of credit in the amount of $80,000.

(b) The Bank's Discount Committee approved Mr. Bluford's application, and an $80,000 line of credit was granted to Mr. Bluford, d/b/a Bluford Services Company.

(c) As security for this line of credit, Mr. Bluford, on March 31, 1977, executed an assignment to the Bank of the subcontract proceeds.

(d) The Bank later sent a Notice of Assignment to the Department of the Army. The assignment was acknowledged by the contracting officer on April 6, 1977, by an official of the Finance Office at Fort Sill on May 13, 1977.

13. The Bank made the first loan to Mr. Bluford under the line of credit on May 9, 1977.

Extensions of Mr. Bluford's Line of Credit

14. The Bank's Discount Committee held a meeting on December 16, 1977. At that time, following Mr. Henderson's favorable recommendation, the Discount Committee approved an extension in Mr. Bluford's line of credit in the amount of $80,000 for the months of January, February, and March of 1978. This was in conformance with the Bank's policy of only approving lines of credit to begin at a future date.

15. (a) The line of credit between Mr. Bluford and the Bank worked as follows: Mr. Bluford would go to the Bank, talk to Mr. Henderson, ask for a loan in the amount of $80,000, and sign a promissory note for it. The money from the loan would be deposited in the payroll account of Bluford Services. This occurred twice a month, with approximately 15-17 days between notes. Mr. Bluford was supposed to pay off any pending loan before receiving a new one.

(b) Mr. Bluford and Mr. Henderson had the opportunity to, and in fact did, engage in conversations on the occasions when Mr. Bluford went to the Bank for a new loan.

16. Typically, an assignment of proceeds under a government contract works as follows: A lender loans money to a contractor and takes an assignment of the contract proceeds. After the proper filing and acknowledgment of the assignment, the proceeds from the contract are disbursed in the form of checks, which are made payable to the contractor in care of the assignee and which are mailed to the assignee.

17. The required procedures in the Finance Office at Fort Sill, when that office receives a formal assignment of a contract, are as follows: The Finance Office receives a copy of the assignment and requires the Procurement Office to acknowledge it. Thereafter, each payment voucher is made out to show the assignor and assignee. Payment under the contract is then mailed directly to the assignee.

18. (a) Before the assignment of March 31, 1977, was executed by Mr. Bluford, checks due under the subcontract were made payable to Bluford Services and were mailed by Fort Sill to Mr. Bluford.

(b) After the assignment became effective, checks due under the subcontract were made payable to Bluford Services in care of the Bank and were mailed by Fort Sill to the Bank. Mr. Bluford would learn that a check had been received by the Bank because Mr. Henderson would call him on the telephone and inform him.

(c) When a check was received by the Bank from Fort Sill, Mr. Henderson deposited the proceeds of the check into Mr. Bluford's payroll account, after deducting the amount due the Bank on the loan which the Bank

had made for the period covered by the check. This customarily happened twice each month.

(d) After the assignment went into effect, each check received by the Bank from Fort Sill under the subcontract was made out as payable to:

> Bluford Services Co.
> c/o Security Bank & Trust Company
> Drawer 489
> Lawton, OK 73501.

(e) Every check issued in payment under the subcontract, beginning in May 1977 and continuing until the last payment was made, had the Bank's name on it and was mailed to the Bank.

19. In July 1977, two loans were made to Mr. Bluford, in the total amount of $50,000, that were outside the $80,000 line of credit. There was no additional collateral, beyond the assignment of the Fort Sill subcontract proceeds, required for these loans.

20. On January 27, 1978, Bluford Services, by Foxie Bluford, executed a Financing Statement and Security Agreement to the Bank, giving the Bank a security interest in "all accounts receivable and contract rights now owned and hereafter acquired and all proceeds therefrom." Subsequently, this document was filed by the Bank in the appropriate filing office.

Modification of the Contract

21. (a) On or about February 25, 1978, by Modification No. 0025, the term of the prime contract and of the subcontract was extended through September 30, 1978.

(b) In addition, the prime contract was modified to state in part as follows:

> By mutual agreement, this contract can be terminated for convenience of the Government in the event a contract is awarded on IFB DABT39-77-B-0066, Cook and KP service, Fort Sill, Oklahoma, at any time prior to the expiration of this contract as extended through 30 September 1978, and the effective date for a termination for convenience of the Government of Contract DABT39-76-C-3164 will be at the end of the month in which a new contract is awarded on IFB DABT39-77-B-0066.

(c) This modification was signed by Mr. Bluford, the SBA, and the Department of the Army.

22. On or about March 3, 1978, Mr. Henderson was informed by Mr. Rylant orally that the prime contract had been modified to include a provision giving the Government the right to terminate the contract for convenience. Mr. Rylant stated, in this connection, that if the prime contract were to be terminated at any time, Mr. Henderson would have plenty of advance notice, so that the Bank would be protected.

23. On March 10, 1978, Mr. Ball sent a letter to Mr. Henderson relative to the modification of the contract mentioned in finding 21, and attached a copy of the modification. Mr. Ball's letter stated in pertinent part as follows:

> An extension to this contract through September 30, 1978 has just been executed on Modification No. 0025 (copy attached) between Fort Sill, SBA and Bluford. This extension was issued due to the fact that Fort Sill has not been able to award a contract to a responsible bidder on their IFB issued by them in July, 1977. It is our opinion that an award will not be made on this within the remaining period. If one is made,

SBA and Bluford will be given at least a 30-day notice. If this does come into effect, this office will immediately notify you of the termination date.

* * * Your bank has an assignment on this contract in which all monies are received at your bank prior to being received by Bluford. Bluford is paid twice a month, once on the 15th in which he receives $135,000 for this period, and at the close of the month in which his check is for over $100,000. Your records at the bank should indicate this. You may want to consider raising his line of credit to $100,000.

24. In the letter of March 10, 1978, Mr. Ball suggested that the Bank might want to raise Mr. Bluford's line of credit to $100,000.

25. The Bank did not raise Mr. Bluford's line of credit to $100,000, or change in any way its conduct with respect to Mr. Bluford's line of credit.

26. Mr. Ball was the only individual at the SBA Oklahoma City Regional Office with contracting authority to act for the United States.

27. On March 17, 1978, after Mr. Henderson received Mr. Ball's letter of March 10, 1978, the Bank's Discount Committee held a meeting and approved an extension of Mr. Bluford's line of credit for a period of 6 months.

28. On June 29, 1978, the Bank loaned Bluford Services $80,000. On July 14, 1978, the Bank made an additional loan of $80,000 to Bluford Services. The June 29, 1978, loan was not paid until July 20, 1978. Therefore, for the period from July 14 through July 20, 1978, there was an indebtedness of $160,000 owed by Bluford Services to the Bank. Mr. Henderson did not require Mr. Bluford to supply any additional security for the amount of the loan

that exceeded the $80,000 line of credit authorized by the Bank's Discount Committee.

Termination of the Contract

29. (a) On or about August 24, 1978, the Department of the Army notified Bluford Services and the SBA that the prime contract and the subcontract would be terminated effective August 31, 1978.

(b) Neither the SBA nor Mr. Bluford gave the Bank any advance notice, oral or written, that the prime contract and the subcontract would be terminated effective August 31, 1978, or any notice, oral or written, during the month of September 1978 that the prime contract and subcontract had been terminated effective August 31, 1978. In fact, the Bank did not learn from any source about the termination of the prime contract and subcontract until sometime after October 17, 1978.

(c) Throughout the period from August 24, 1978, until the end of September 1978, the Bank proceeded in the belief that the prime contract and subcontract would continue in existence until the regularly scheduled termination date of September 30, 1978.

Events After Notice of Termination

30. On August 30, 1978, the defendant, acting through the Department of the Army at Fort Sill, Oklahoma, awarded a new food service contract at Fort Sill directly to Mr. Bluford, d/b/a Bluford Services Company, for a 1-month period, extending from September 1 through September 30, 1978. This contract was numbered DABT39-78-C-3202. No formal assignment was executed with regard to this 1-month direct contract.

31. As of August 31, 1978, the payroll account of Bluford Services at the Bank reflected a negative balance of $782.85. This was only 6 days after Mr. Bluford had received his most recent check, and it was 11 days before he was due to receive his next check, from Fort Sill under the subcontract.

32. (a) On September 1, 1978, Mr. Henderson presented to the Discount Committee an application from Mr. Bluford for a 30-day extension of the line of credit, to run from September 1 through September 30, 1978, in the amount of $80,000. Mr. Henderson recommended that the extension be approved, and his recommendation was followed by the Discount Committee.

(b) In extending Mr. Bluford's line of credit on September 1, 1978, the Bank was acting in the belief that the prime contract and subcontract were still in effect.

33. (a) On September 8, 1978, Mr. Bluford went to the Bank and obtained a loan of $80,000 from Mr. Henderson. On that date, the most recent previous loan to Mr. Bluford had been made on August 25, 1978, in the amount of $80,000, and the August 25 loan had not been paid off by Mr. Bluford. Accordingly, as of September 8, 1978, Mr. Bluford owed the Bank a total of $160,000, or $80,000 beyond Mr. Bluford's line of credit at the Bank. Mr. Henderson did not require Mr. Bluford to provide any additional security in connection with the September 8, 1978, transaction.

(b) At the time when the September 8, 1978, loan was made, Mr. Henderson and the Bank were unaware that the prime contract and subcontract had been terminated effective August 31, 1978.

(c) The $80,000 loan that the Bank made to Mr. Bluford on August 25, 1978, was paid off on September 11, 1978.

34. (a) On September 11, 1978, the final check from Fort Sill, in the amount of $107,054.53, under the prime contract and the subcontract was received by the Bank. The sum of $80,000 was deducted in order to pay off Mr. Bluford's note of August 25, 1978, and the remainder was deposited to the payroll account of Bluford Services.

(b) The check referred to in paragraph (a) of this finding was made payable as follows, in accordance with the practice uniformly followed ever since the assignment to the Bank of the proceeds under the subcontract:

Bluford Services Company
c/o Security Bank & Trust Company
Drawer 489
Lawton, Oklahoma 73501

35. (a) On September 22, 1978, the Bank loaned Mr. Bluford $80,000. On that date, the $80,000 which had been loaned to Mr. Bluford on September 8, 1978, had not been paid off, with the result that, as of September 22, 1978, Bluford Services was indebted to the Bank in the total amount of $160,000, or $80,000 beyond Mr. Bluford's line of credit at the Bank.

(b) At the time when the loan was made to Mr. Bluford on September 22, 1978, Mr. Henderson and the Bank were not aware that the prime contract and subcontract had been terminated effective August 31, 1978.

(c) The Bank has not been repaid the $80,000 which it loaned to Mr. Bluford on September 22, 1978.

36. If the Bank had known on September 8 and 22, 1978, that the prime contract and the subcontract had been terminated effective August 31, 1978, the Bank would not have made additional loans to Mr. Bluford.

37. (a) On or about September 25, 1978, Mr. Bluford went to the Bank, having in his possession a check from Fort Sill dated September 22, 1978, and in the amount of $110,000. This check had been mailed to Mr. Bluford by Fort Sill, it represented a payment for services under the 1-month direct contract mentioned in finding 30, and it was made payable as follows:

Bluford Services Company
P. O. Box 343
Lawton, Oklahoma 73501

(b) This change in payee and addressee was a deviation from a long-term pattern of more than 30 checks issued under the subcontract, all of which had been mailed to the Bank and which had been made payable as follows:

Bluford Services Company
c/o Security Bank & Trust Company
Drawer 489
Lawton, Oklahoma 73501

(c) Mr. Bluford delivered the September 22, 1978, check to Mr. Henderson, who went through his regular procedure in connection with the processing of Bluford Services' checks. He deducted the amount of $80,000 in payment of the loan which the Bank had made to Mr.

Bluford on September 8, 1978, and he credited the remainder to Mr. Bluford's payroll account. None of the proceeds from this check was applied on the loan which the Bank had made to Mr. Bluford on September 22, 1978.

38. On or about October 10, 1978, while Mr. Bluford was at Fort Sill, the Fort Sill Finance Office delivered to him a check in the amount of $85,378.84, representing the last payment for services under the 1-month direct contract referred to in finding 30. Mr. Bluford used the proceeds from this check to purchase two cashier's checks, one in the amount of $50,000 and the other in the amount of $35,000. He used the $35,000 cashier's check to pay off a loan which he had previously obtained from the Sheppard Air Force Base Credit Union, and he deposited the $50,000 cashier's check in his payroll account at the Bank.

39. On October 13, 1978, Mr. Henderson called Mr. Bluford on the telephone because Mr. Bluford's accounts at the Bank were overdrawn. Mr. Bluford's payroll account was overdrawn in the amount of approximately $3,500 and his special account was overdrawn in the amount of approximately $200. Mr. Bluford deposited $3,500 in his payroll account on October 13, 1978.

40. Sometime after learning that Mr. Bluford had been injured in an automobile accident on October 17, 1978, Mr. Henderson inquired of the Department of the Army at Fort Sill for the first time as to whether Mr. Bluford was due any further payment for his services under the prime contract and subcontract. It was on that occasion that Mr. Henderson learned for the first time that the contract and the subcontract had been terminated

by the Department of the Army on August 24, 1978, effective August 31, 1978.

41. (a) On November 6, 1978, the Bank filed an action against Mr. Bluford in the District Court of Comanche County, Oklahoma. The complaint sought to recover the balance due on the September 22, 1978, loan and relied upon the Financial Statement and Security Agreement which Mr. Bluford had executed on January 27, 1978 (see finding 20). The prayer sought as relief a writ of attachment on Mr. Bluford's property, as well as a judgment against Mr. Bluford in the amount of $80,000, plus interest, attorney's fees, and costs.

(b) On or about February 22, 1979, the Bank recovered $5,800 as proceeds from an auction of some of Mr. Bluford's janitorial equipment. Although the auction was a result of the November 6, 1978, action based on the $80,000 loan of September 22, 1978, which asked for a writ of attachment on Mr. Bluford's property, the proceeds from the sale of the property were not applied to the September 22, 1978, loan but, instead, were applied to a later loan which the Bank had made to Mr. Bluford on October 10, 1978, and which was secured by an assignment under another government contract.

42. On June 19, 1980, Mr. Bluford filed a voluntary petition in bankruptcy. He has not been discharged from his debt to the Bank.

APPENDIX D

(SEAL)

U.S. SMALL BUSINESS ADMINISTRATION
FEDERAL BUILDING—SUITE 670
200 N.W. 5TH STREET
OKLAHOMA CITY, OK 73102

March 10, 1978

The Security Bank & Trust Company

Attn: Perman Henderson, Vice President
P.O. Box 489
Lawton, OK 73501

Dear Mr. Henderson:

Reference telephone conversation on March 3, 1978 between you and Jack Rylant of this office on extension of cook and KP contract at Fort Sill, and line of credit with Bluford Service Company.

An extension to this contract through September 30, 1978 has just been executed on Modification No. 0025 (copy attached) between Fort Sill, SBA and Bluford. This extension was issued due to the fact that Fort Sill has not been able to award a contract to a responsible bidder on their IFB issued by them in July, 1977. It is our opinion that an award will not be made on this within the remain-

ing period. If one is made, SBA and Bluford will be given at least a 30-day notice. If this does come into effect, this office will immediately notify you of the termination date.

SBA is the prime contractor and Bluford is our subcontractor. It is our responsibility to assure that the services are provided for this contract. A review of our file reflects that Bluford performs the work and receives all payments. Your bank has an assignment on this contract in which all monies are received at your bank prior to being received by Bluford. Bluford is paid twice a month, once on the 15th in which he receives $135,000 for this period, and at the close of the month in which his check is for over $100,000. Your records at the bank should indicate this. You may want to consider raising his line of credit to $100,000.

Sincerely,

/s/ Robert K. Ball
Acting District Director

Attachment
PLAINTIFF'S EXHIBIT NO. 4

APPENDIX E

8:6 DPC #76-6 31 JAN. 1977

TERMINATION OF CONTRACTS

(b) The following information will be submitted to the appropriate Departmental liaison point:

(i) contract number, date, type of contract;

(ii) name of company;

(iii) nature of contract or end item;

(iv) the reasons for the termination;

(v) contract price of items terminated;

(vi) total number of contractor employees involved including the Government's estimate of the number who may be discharged;

(vii) statement of anticipated impact on the company and the community (identify); identify area labor category; whether contractor is large or small business, and include any known impact on hardcore disadvantage employment programs;

(viii) total number of subcontractors involved as well as the impact in this area, if known; and

(ix) draft unclassified or suggested press release of information.

(c) Clearance to release the information will be requested as soon as possible after the decision has been made to terminate a contract. Pending receipt of clearance to release, information pertinent to the termination will require "For Official Use Only" handling unless a security clearance is required.

(d) The Departmental liaison points for prior clearance to release information on significant terminations are as follows:

Army—OSA, OCLL (SACLL), ASA (I&L) (copy)

Navy—Chief of Legislative Affairs (OLA-N)

Air Force—Hq. USAF (AFLGP)

Defense Supply Agency—DSAH-PC

Defense Communications Agency—Contract Management Division (Code 260)

Defense Nuclear Agency—Chief, Office of Procurement (OATR)

Defense Mapping Agency—DMA/LO

(e) Liaison offices of Departments will act promptly on the request for clearance to release information (not later than two working days after receipt) to avoid the accrual of termination costs.

(f) This reporting requirement is assigned Report Control Symbol: DD (I&L) (AR) 1412.

8-203 Notice of Termination.

(a) *General.* Contracts shall be terminated for convenience or for default only by a written notice to the contractor (see 8-801 and 16-701). When such a notice is mailed, it shall be sent by certified mail return receipt requested. The written notice shall state:

(i) that the contract is being terminated for the convenience of the Government (or for default) pursuant to the contract provisions authorizing such termination;

(ii) the effective date of termination;

(iii) the extent of termination and, if a partial termination, the portion of the contract to be continued;

(iv) recommended actions to be taken by the contractor to minimize the impact on his personnel if the termination, together with all other outstanding terminations, will result in a significant reduction in the contractor's work force (see paragraph 7 of the notice in 8-801.2); and

(v) any special instructions.

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(b) Distribution of Copies. Simultaneously with issuance of the termination notice to the contractor a copy shall be sent to the contract administration office and to any known assignee, guarantor, or surety of the contractor.

(c) *Amendment of Termination Notice.* A notice of termination may be amended to provide for:

(i) the correction of mistakes in the notice of a nonsubstantive nature,

(ii) addition of supplemmental data or instructions, and

(iii) recession of the notice when it has been determined that the items of work terminated had been

completed or shipped prior to the contractor's receipt of the notice.

(d) *Reinstatement of Terminated Contracts.* The purchasing office may reinstate the terminated portion of a contract in whole or in part by an amendment to the notice of termination provided that it has been determined in writing that:

(i) circumstances clearly indicate a requirement for the terminated items; and

(ii) reinstatement is advantageous to the Government, *provided that* the written consent of the contractor is obtained to the reinstatement.

8-204 Methods of Settlement. Settlement of terminated cost-reimbursement type contracts and of fixed-price type contracts terminated for convenience may be effected by (i) negotiated agreement, (ii) determination by the TCO (III) in the case of cost reimbursement type contracts, costing out under vouchers using Standard Form 1034 or (iv) a combination of these methods. Every effort shall be made to reach a fast and prompt settlement with the contractor. The negotiated agreement is the most expeditious and most satisfactory method of settling termination claims and shall be used whenever feasible. Settlement by determination shall be used only when a termination claim cannot be settled by agreement.

8-205 Duties of Prime Contractor After Receipt of Notice of Termination. The contractor, after receipt of the notice of termination and except as otherwise directed by the TCO, must comply with the termination clause of the contract and the notice of termination which generally require, among other things that the contractor:

(i) stop work immediately on the terminated portion of the contract and discontinue placing subcontracts thereunder;

(ii) terminate all subcontracts related to the terminated portion of the prime contract;

(iii) immediately advise the TCO of any special circumstances precluding the stoppage of work;

(iv) if the termination is partial, perform the continued portion of the contract and submit promptly any request for an equitable adjustment of price with respect to the continued portion of the contract, supported by evidence of any increase in the cost thereof;

(v) take such action as may be necessary, or as the TCO may direct to protect and preserve property in the possession of the contractor in which the Government has or may acquire an interest; and, to the extent directed by the TCO, deliver such property to the Government;

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ARMED SERVICES
PROCUREMENT REGULATION

(2)

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CLERK

No. 84-527

In the Supreme Court of the United States

OCTOBER TERM, 1984

SECURITY BANK & TRUST COMPANY OF LAWTON, OKLAHOMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether petitioner, a bank that maintained an $80,000 line of credit for a government contractor who had assigned to petitioner the proceeds of his contract, may recover damages from the United States for the government's failure to inform petitioner of the early termination of the contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 731 F.2d 861. The opinion of the Claims Court (Pet. App. 23a-48a) is reported at 2 Cl. Ct. 646.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1984. A petition for rehearing was denied on May 30, 1984 (Pet. App. 22a). On August 27, 1984, the Chief Justice granted an extension of time to and including September 28, 1984, within which to file a petition for a writ of certiorari. The petition for a writ of certiorari was filed on September 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of the Army entered into a contract for the provision of food services at Fort Sill, Oklahoma, with the Small Business Administration (SBA) under the SBA's program setting aside certain government contracts for disadvantaged contractors (see 15 U.S.C. 637(a)). On October 1, 1976, the SBA entered into a subcontract with the Bluford Services Company, which was owned and operated by Foxie M. Bluford, for performance of the Fort Sill food service contract. Pet. App. 2a. The contract originally expired on September 30, 1977, but it was extended three times, with the final extension terminating on September 30, 1978 (*ibid.*).

Bluford had difficulties meeting his payroll, and therefore obtained an $80,000 line of credit from petitioner (Pet. App. 2a-3a). As security for this line of credit, Bluford assigned to petitioner the proceeds of his subcontract (*id.* at 3a). Thereafter, Bluford would go to the bank twice a month and ask Perman Henderson, vice president of petitioner and a loan officer, for an $80,000 loan (*id.* at 3a-4a). Checks due under the subcontract were made payable to Bluford Services in care of petitioner and were sent by the Army directly to petitioner (*id.* at 4a). When a check was received by petitioner, Henderson would pay off any outstanding loan and deposit the excess in Bluford's payroll account (*ibid.*). The court below noted that "Bluford was supposed to pay off any pending loan before receiving a new one" (*ibid.*).

When the contract was extended for the third time, through September 30, 1978, it was modified to provide that it could be terminated for the convenience of the government (Pet. App. 4a). In a March 10, 1978 letter, Robert K. Ball, the Acting District Director of the SBA, informed Henderson of this extension and stated that if the contract was terminated prior to its expiration date, "this

office will immediately notify you of the termination date" (*id.* at 5a). The Army terminated the contract effective August 31, 1978, but neither the SBA nor Bluford informed petitioner of the termination (*id.* at 5a-6a).

On August 30, 1978, the Army awarded a new, one-month contract directly to Bluford, without using the SBA as an intermediary (Pet. App. 6a). On September 8, 1978, Bluford obtained another loan of $80,000 from petitioner, which did not know of the termination of the original contract or that the new loan would be used to help Bluford perform a new contract (*ibid.*). On September 22, 1978, Bluford borrowed another $80,000 from petitioner, even though the September 8 loan had not been repaid (*ibid.*). According to the court of appeals, "[t]his was contrary to the arrangement he had with the bank and also different from the custom and practice they had followed in the past * * *. Furthermore, this second $80,000 loan was in excess of the line of credit of $80,000 the bank had approved for him" (*ibid.*).

Three days after he obtained the second $80,000 loan, Bluford went to petitioner with a check for $110,000 that he had received from Fort Sill (Pet. App. 6a). For the first time since the execution of the assignment, the Army had sent a check to Bluford instead of petitioner and had made it payable solely to Bluford rather than to Bluford in care of petitioner (Pet. App. 6a-7a). Nevertheless, Henderson made no inquiry about the sudden change in the method of drawing and delivering the Army's payments under the contract (*ibid.*). Rather, Henderson simply cashed the check, applied $80,000 of the amount to the September 8 loan, and deposited the remaining $30,000 in Bluford's payroll account (*id.* at 7a). On October 10, 1978, Fort Sill delivered another check to Bluford, this time for $85,378.84, the last payment under the one-month contract (*ibid.*). Bluford purchased two cashier's checks, one for $50,000,

the other for $35,000, and deposited the $50,000 check in his payroll account at petitioner (*id.* at 7a-8a). Petitioner did not apply any of this $50,000 to the September 22 loan (*id.* at 8a). On October 17, 1978, after Henderson learned that Bluford had been injured in an automobile accident, he called the Army to find out if Bluford had any more payments forthcoming (*ibid.*). Henderson was then informed of the cancellation of the original contract and of the one-month direct contract (*ibid.*).

2. Petitioner brought suit against Bluford in state court on the unpaid $80,000 loan, and recovered $5,800 as a result of attaching and selling some of Bluford's equipment (Pet. App. 8a). However, petitioner applied these proceeds to another outstanding loan to Bluford, not to the unpaid $80,000 loan. Instead, petitioner sought to recover the full $80,000 from the government by filing this action in the Claims Court. Petitioner contended that the March 10, 1978 letter from the SBA to Henderson created an implied-in-fact contract obligating the SBA to notify petitioner of the termination of its contract with Bluford, and that the SBA breached the contract by failing to give the termination notice. Pet. App. 8a-9a.

The Claims Court dismissed the complaint after trial (Pet. App. 23a-48a). The court found that the March 10 letter constituted an agreement between the SBA and petitioner in which the SBA made a promise in exchange for petitioner's performance, *i.e.*, its continued making of regular loans to Bluford that enabled him to perform his food service contract (*id.* at 30a-31a). The court found that the SBA's promise was its assurance that petitioner would receive repayment for these loans (*id.* at 31a). It held that petitioner could not recover the $80,000 it sought under this agreement, because the unpaid loan did not relate to the SBA subcontract and therefore was outside the scope of the March 10 letter (Pet. App. 31a-32a).

3. The court of appeals affirmed (Pet. App. 1a-18a). It concluded that petitioner could not recover for breach of the implied-in-fact contract allegedly created by the March 10, 1978 letter from the SBA. First, the court held that petitioner received every payment made under the contract assigned to petitioner and that these payments constituted the full extent of the government's liability under the assignment (*id.* at 12a). Second, the court found that the government was not liable because the unpaid September 22, 1978 loan was used by Bluford for the direct one-month contract and was thus outside the scope of the March 10, 1978 letter from the SBA, which dealt only with the original contract (*id.* at 12a-13a). Third, the court found that the unpaid September 22 loan was beyond the $80,000 line of credit, because when it was made Bluford already owed $80,000. The court stated that "it appears that the September 22, 1978, loan was not only unauthorized but also was contrary to the tacit understanding between the bank, the SBA and Mr. Bluford that no $80,000 loan would be made until and unless the previous loan in that amount had first been paid" (*id.* at 13a). The court declined to hold the government responsible "for such negligent management by the bank of its financial affairs" (*ibid.*). Finally, the court found that petitioner's loss "was the result of the bank's own mismanagement and negligence" (*ibid.*) because Henderson "was at least put on inquiry to find out" why Bluford suddenly began to receive payment directly from the Army instead of through the bank (*id.* at 14a-15a). The court observed that the $30,000 left over from the $110,000 check that Henderson cashed, plus the $50,000 cashier's check that Bluford deposited in his payroll account from the [illegible]id payment under the one-month contract, would have fully covered the September 22 loan (*ibid.*).

The court of appeals also rejected petitioner's claims that it was entitled to recover for the government's alleged violation of the Assignment of Claims Act of 1940, 31 U.S.C.

3727 and 41 U.S.C. 15, and an Armed Forces Procurement Regulation, 32 C.F.R. 8-203(b). The court held that the Assignment of Claims Act of 1940 requires only that the government pay the assignee all amounts payable under the assigned contract, and that was done here (Pet. App. 16a-17a). Moreover, the Armed Services Procurement Regulation, which petitioner alleges the government breached by its failure to give notice of termination of the contract, creates no cause of action for damages, since it does not by its terms require the payment of money (*id.* at 17a).

Judge Bennett dissented, asserting that "to me this is a clear and classic case of a contract implied in fact that has been breached by the government" (Pet. App. 18a).

ARGUMENT

The court of appeals correctly rejected each of petitioner's theories for recovery of damages against the United States. Moreover, the decision below does not conflict with any decision of this Court or of another court of appeals. Review by this Court therefore is not warranted.

1. Petitioner's principal argument in this Court (Pet. 10-12) is that the Army's failure to notify it of the termination of the original SBA contract with Bluford violated a provision of the Armed Services Procurement Regulations which provides that "[s]imultaneously with issuance of the termination notice to the contractor a copy shall be sent to the contract administration office and to any known assignee, guarantor, or surety of the contractor." 32 C.F.R. 8-203(b). As petitioner concedes (Pet. 11), this provision "was not contained in or incorporated by reference into the" contract between Bluford and the SBA. Moreover, even assuming arguendo that the regulation had been incorporated into Bluford's contract and that it was violated by the Army, petitioner cannot recover damages on a breach of contract theory. As an assignee, petitioner "did not have

privity of contract or any contractual relationship with the Government" (*Produce Factors Corp.* v. *United States*, 467 F.2d 1343, 1347 (Ct. Cl. 1972)). Therefore, it is limited to the rights conferred by the Assignment of Claims Act of 1940, and cannot maintain an action for breach of the underlying contract (*ibid.*).[1]

Petitioner similarly cannot base a right to recover damages upon the regulation itself.[2] As the court below explained (Pet. App. 17a), because the regulation does not by its terms require the payment of money to an assignee, no cause of action will lie for damages under the Tucker Act. *United States* v. *Testan*, 424 U.S. 392, 401-402 (1976); *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1008 (Ct. Cl. 1967).[3]

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[1]The cases cited by petitioner (Pet. 11) all concern the question whether a particular regulation was incorporated into a contract. See *United States* v. *New Orleans Public Service, Inc.*, 553 F.2d 459 (5th Cir. 1977) (antidiscrimination clause incorporated by operation of law); *G.L. Christian & Assoc.* v. *United States*, 312 F.2d 418 (Ct. Cl. 1963), cert. denied, 382 U.S. 821 (1965) (termination clause incorporated into contract by force of law); *General Electric Co.* v. *Moretz*, 270 F.2d 780 (4th Cir. 1959) (shipping regulations deemed to be part of contract). None of these decisions holds that a nonparty to a contract, such as petitioner, is entitled to recover damages for the violation of a regulation incorporated into the contract.

[2]The cases upon which petitioner relies (Pet. 9, 14) stand only for the unexceptional proposition that the government must conform to its regulations. They do not hold that the violation of a regulation creates a cause of action for damages. In each case there was an independent source for the plaintiff's cause of action. See *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (judicial review of denial of social security benefits); *Service* v. *Dulles*, 354 U.S. 363 (1957) (wrongful discharge action); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) (habeas corpus action).

[3]Although the dissenting judge contended (Pet. App. 19a-20a) that the regulation gave rise to an implied contract between the government and the assignee, this Court held in *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. 728, 738-740 (1982), that a contract could

2. Petitioner also argues that under the Assignment of Claims Act of 1940, "the assignee of government contract rights is entitled to certain governmental protection of its interest" (Pet. 10, 12-13) and that it therefore is entitled to damages under the Act. The flaw in this argument is that the statute provides no protection for the interest that petitioner asserts. The court of appeals correctly stated (Pet. App. 17a) that "[a]ll that this Act requires of the government is that it pay all amounts to the assignee that are payable under the assigned contract which have not already been paid." See also *Produce Factors Corp.* v. *United States*, 467 F.2d at 1349. All payments that Bluford assigned to petitioner were in fact made. The payment under the one-month special contract was not made to petitioner because that contract did not contain an assignment to petitioner.[4]

3. Petitioner also briefly reiterates (Pet. 13-14) what was its chief argument below: that the March 10, 1978 letter from the SBA to petitioner created an implied-in-fact contract and that the government's failure to notify petitioner of the termination of the contract with Bluford constituted a breach of the implied contract. The determination of the Claims Court (Pet. App. 31a-32a) that petitioner cannot recover on this ground was upheld by the court of appeals

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not be implied solely from the existence of regulations. The cases cited by the dissent (Pet. App. 20a) are inapposite because they all involved a claim of an implied contract based upon negotiations between the government and the plaintiff.

[4]The two cases cited by petitioner (Pet. 12-13) concern instances in which the government was held liable because it violated rights specifically granted to assignees by the statute. See *Mercantile National Bank* v. *United States*, 280 F.2d 832 (Ct. Cl. 1960) (government improperly offset earlier overpayments against payments to assignee); *Central National Bank* v. *United States*, 91 F. Supp. 738 (Ct. Cl. 1950) (government ignored valid assignment and made payments to contractor). They do not help petitioner because the Act does not grant the right to notice asserted by petitioner.

(*id.* at 11a-15a). This fact-bound issue is not appropriate for review by this Court.

In addition, the lower courts' determinations are correct. For example, the court of appeals properly found (Pet. App. 13a-15a) that petitioner's negligence, not the absence of notice, was the cause of its loss. Within days of making the second loan — in violation of the terms of the line of credit and thus in violation of any agreement that existed with the SBA — petitioner's loan officer cashed a check made payable to Bluford alone and sent by the Army to Bluford, not to petitioner. Petitioner should have realized from this change in the method of payment that a change in petitioner's status had occurred. If petitioner had made an inquiry at this point, it would have been able to recover the full amount of the unpaid loan (*id.* at 15a). Petitioner's failure to act was negligent, and that negligence alone is fatal to its claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1984

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